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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

No. 73-1697

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant,

v.

DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

MOTION TO DISMISS OR AFFIRM

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DEPARTMENT OF REVENUE,
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ON APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein for lack of a substantial federal question or, in the alternative, to affirm the judgment of the Washington State Court of Appeals, Division II, on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

I

JURISDICTION

The jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

QUESTION PRESENTED

Is the appellant subject to the Washington business and occupation tax imposed on the privilege of engaging in wholesaling in Washington measured by the gross receipts of its Washington sales (the tax before this court in *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964)) when: appellant conducts activities in Washington through a resident employee and other employees who visit appellant's sole Washington customer in a regular and systematic manner and whose activities (i) are essential, necessary and decisive factors in order for appellant to establish and maintain Washington as a market for its products and (ii) whose activities are directly associated with its Washington wholesale sales as found by the Washington Department of Revenue, the Washington Board of Tax Appeals, the Washington Superior Court and the Washington Court of Appeals?

Essentially, the appellant by this appeal challenges the findings of fact and factual and legal conclusions derived therefrom by the Washington Court of Appeals and in turn the Washington Superior Court, the Washington Board of Tax Appeals and

the appellee. In sum, what appellant asks this court to do is to review the record in this cause and to conclude that Washington does not have taxable nexus based upon the appellant's interpretation of the significance and operative effect of the facts in this cause and its interpretation of the facts in *Norton Co. v. Department of Revenue*, 340 U.S. 534, 95 L.Ed. 517, 71 S.Ct. 377 (1950) in regard to the exempt interstate sales there involved.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions involved are set forth in the Jurisdictional Statement as Appendices G and H at pages A-24 through A-27.

STATEMENT OF THE CASE

As indicated in the Court of Appeals decision, "The hearings below before both the Board of Tax Appeals and the trial court were conducted on the basis of the deposition of H. Robert Martinson, an employee of plaintiff, various exhibits introduced in connection with the deposition, and the pleadings in the case. There was no 'live testimony.'" (Jur. St., p. A-8)

For this reason, the Court of Appeals found it unnecessary to consider the five findings of fact assigned as error by the appellant. It thus reviewed

[1] In addition to *Norton*, appellant relies on *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 98 L.Ed. 744, 74 S.Ct. 535 (1954) and *American Oil Co. v. Neill*, 380 U.S. 451, 14 L.Ed.2d 1, 85 S.Ct.1130 (1965).

the matter *de novo* on the record before it. The Court of Appeals then recited the following facts and its findings and conclusions in regard thereto:

> "The record discloses that plaintiff, Standard Pressed Steel Company, is a foreign corporation with production facilities located in Jenkintown, Pennsylvania and Santa Ana, California. A significant amount of plaintiff's business involves the manufacture and sale of fasteners (nuts and bolts, generally) to be used in the aerospace industry, and plaintiff's principal customer in this state during the tax years in question was the Boeing Company in Seattle.
>
> "The only employee of Standard Pressed Steel present within the State of Washington over the tax years in question was H. Robert Martinson, a 'sales engineer.' Martinson performed his activities for Standard Pressed Steel out of a portion of a room in his home equipped with a desk, telephone, and a file cabinet.
>
> "Martinson's primary function was to work with Boeing's engineers in the initial phases of aerospace design and construction, and through contact with Boeing engineers inform himself of possible prospective needs of the Boeing Company, and its various subcontractors, for aerospace fasteners. He would then initiate a product engineering request describing in detail the specifications required by Boeing and send this information on to plaintiff's out-of-state offices. After receiving this information from Martinson, plaintiff would make a decision as to whether or not Standard Pressed Steel would attempt to 'qualify' as a Boeing supplier of a particular fastener; that is, Boeing determined who could be a supplier of component parts by qualification tests done at their Seattle facilities. If plaintiff would manufacture sam-

> ple qualification pieces and forward these to Boeing for qualification tests. If the fasteners met the required specifications, Standard Pressed Steel would become an 'approved source' and the Boeing Company would then enter into negotiations with plaintiff's out-of-state offices for purchase of the fasteners.
>
> "The record reflects that all such dealings and negotiations between Boeing and Standard Pressed Steel were carried on directly between Boeing and plaintiff's out-of-state offices. Martinson was bypassed completely, except to the extent that he periodically informed plaintiff of the various subcontractors, purchasing specialists, and control buyers of commodities for which Standard Pressed Steel was an approved source. Martinson had nothing to do with quoting prices, delivery dates, receiving, soliciting, accepting orders, handling shipments, or approving credit. No inventories were kept in this state and all deliveries were made by plaintiff directly through a common carrier.
>
> "The above qualification process consumed approximately 80 to 90 percent of Martinson's time, with the remainder devoted to 'trouble-shooting.' If Boeing experienced any problems in their use of the fasteners supplied by the plaintiff, Martinson's duties were to relay this information to plaintiff's engineers at the out-of-state offices, and there the engineers would work to resolve any difficulties with the product in their laboratories. The engineers would then forward their solution to Martinson, who would present the proposed solution to Boeing's engineers in Seattle. In addition, approximately three days every six weeks Martinson would set up meetings between Boeing engineers and visiting groups of plaintiff's engineers to visit and

discuss engineering problems. (Jur. St. pp. A-9-A-11)

• • •

"Here the record clearly discloses that Standard Pressed Steel Company employed Mr. Martinson as a resident agent within this state to conduct business activities with the Boeing Company, in part out of his Washington residence as an office, so that Standard Pressed Steel could: (1) become aware of which of its products the Boeing Company might be able to use; (2) secure the testing of sample products to qualify the products for sale to the Boeing Company; (3) obtain the engineering designs for such products; (4) resolve problems in the use of the products after receipt and use by the Boeing Company; (5) obtain and retain goodwill and working rapport with Boeing personnel; and (6) secure and update lists of Boeing purchasing specialists or control buyers, and the commodities for which they are responsible, for the use of the personnel at the plaintiff's home office.

"We are of the opinion that the foregoing substantial services constituted a sufficient peculiarly local and distinct taxable incident within the State of Washington such that imposition of the business and occupation tax was not on the privilege of engaging in interstate commerce, but rather on the privilege of doing local business. (Jur. St. pp. A-12-A-13)

• • •

"We are satisfied that the local activities of Mr. Martinson were instrumental in establishing and maintaining the Boeing Company as a market for the sales giving rise to the proceeds by which the state seeks to measure this tax. We therefore conclude that because the gross receipts from plaintiff's sales to the Boeing Company were reasonably related to the local incidents of the tax, imposition of the business and occupation tax here was not offensive to due process." (Jur. St. p. A-15)

The same factual conclusions arrived at by the Court of Appeals was arrived at in turn by the trial court (Jur. St. A-1, A-2).

The lower court's factual findings and conclusions are amply supported by the record in this cause.

There can be little question then that the appellant's activities in the State of Washington giving rise to the liability in question were directly associated with the wholesale sales in question and were maintained by appellant in Washington to establish and hold Washington as a market for its wholesale sales.

This, of course, was the only purpose of the appellant carrying on its activities in this state. If appellant's resident engineer and other employees of appellant were not in Washington for this purpose, they were here for no known business purpose. This activity was continuous, regular and systematic. Through this activity, appellant maintained constant contact with Boeing in Washington to establish and promote its wholesale sales. It cannot be appropriately labeled *de minimis* in a due process of law sense or disassociated from appellant's Boeing sales in a commerce clause sense.

II

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

To substantiate its claim that the Court of Appeals opinion is in error and that this cause presents a substantial federal question as a matter of constitutional law, the appellant purports to compare the facts in this cause concerning its wholesaling activities in Washington with the facts pertaining to the exempt retail sales in *Norton v. Department of Revenue*, 340 U.S. 534, 95 L.Ed. 517, 71 S.Ct. 377 (1950) and demonstrate by this comparison that *Norton* specifically supports its claim for tax immunity.

It is the appellee's position that appellant's claim of constitutional immunity is based upon at least three fundamental errors, namely: (1) an incomplete statement and a misconstruction of the significance and operative effect of the facts pertaining to its wholesaling activities in this state; (2) a misstatement of the facts in *Norton* pertaining to Norton's engineers and unsupportable inferences concerning the nature and extent of Norton's engineers' activities in Illinois concerning the exempt Norton sales; and (3) an erroneous interpretation and application of the rules of law established in the *Norton* and *General Motors* decisions.

A comparison of the facts in this case, with the facts in *Norton* pertaining to the exempt Norton

sales, clearly demonstrates that the Court of Appeals did not err by finding that the case at bar is distinguishable from *Norton* and that *General Motors* is controlling precedent.

Without referring to the record in this cause and the specific findings of fact by the Court of Appeals, and without referring to the record or opinion in *Norton*, the appellant's assertion of a substantial federal question is primarily devoted to drawing unsupported factual analogies between the facts of this cause and the facts in *Norton* pertaining to Norton exempt sales. The appellant's characterization of the significance and operative effect of the facts in this cause as compared to the facts in the *Norton* case, *supra*, concerning the exempt *Norton* sales has not only been rejected by the Court of Appeals but also by the trial court and the Board of Tax Appeals. Each of these entities arrived at this result after an independent examination of the record in this cause and *Norton*.

In order to show that the findings of fact and conclusions of law as found by the Board of Tax Appeals and the trial court were supported by the record in this cause, the appellee set forth in its answering brief in the Court of Appeals the material facts in this cause, with references, where applicable, to the deposition (including exhibits) of appellant's Washington based employee Mr. Martinson, and the Board's decision and order and the transcript in this cause. An examination of these factual references,

attached to this brief as Addendum A, shows that the Court of Appeals did not err in making its factual findings and conclusions set out in the appellee's Statement of the Case, *supra*.

Significantly, they support the Court of Appeals opinion that the substantial services that appellant conducted in the state of Washington constituted sufficient peculiarly local and distinct taxable incidents within the state of Washington such that imposition of the business and occupation tax was not on the privilege of engaging in interstate commerce but rather on the privilege of doing a local business. The Court of Appeals was justified on the record in concluding:

> "We are satisfied that the local activities of Mr. Martinson were instrumental in establishing and maintaining the Boeing Company as a market for the sales giving rise to the proceeds by which the state seeks to measure this tax. We therefore conclude that because the gross receipts from plaintiff's sales to the Boeing Company were reasonably related to the local incidents of the tax, imposition of the business and occupation tax here was not offensive to due process." (Opinion of the Court of Appeals, Jur. St., A-15.)[2]

[2]This conclusion is identical in substance with the conclusion found by the trial court and comparable to the conclusion arrived at by the Board of Tax Appeals wherein it stated in regard to its factual findings:

> "We find that these factors were a necessary and vital part in the appellant's ability to gain its market with The Boeing Company in this state in the first instance and to hold its market with Boeing in the second. We find that without these factors, secured through the person of Mr. Martinson, or by some other qualified agent or agency of the appellant in this state, it is very unlikely the appellant could have secured or retained The Boeing Co. as its customer. We find that Mr. Martinson's activities, although not directly concerned with the writing of a sales order, the making of delivery, or the procurement of payment, constituted all of the activities of selling necessarily preliminary to the writing of orders. We find the sales activities of Mr. Martinson to be of such importance that the writing of the orders and subsequent activities of delivery and payment are only the end result of his intensive and extensive activities and the activities of the visiting groups of appellant's engineers in this state."

There is thus absolutely no basis for appellant's claim that "The decision of the Washington Court of Appeals, if left to stand, establishes a new rule of law, to wit: any activity at all by a foreign corporation within the taxing state, regardless of the type, amount and effect of such activity, where a customer is located within the taxing state, constitutes a sufficient nexus with the state to justify the imposition of a tax on the privilege of making those sales." (Jur. St., p. 10)

Furthermore, there is no support for the appellant's argument (Jur. St., p. 15) that its activities in Washington were not materially involved in the wholesale sales used to measure the tax in question.

Nor is there any evidence in the *Norton* record or language of the *Norton* decision that indicate any comparable factual findings or conclusions were involved in *Norton*.

The only reference in this court's decision to Norton's engineers is the following:

> "* * * But no solicitors work the territory out of either the home office or the Chicago branch, although petitioner will supply engineering and technical advice. * * *" (340 U.S. at 537)

The only evidence in the record in the *Norton* case concerning engineering activities was the following testimony set out on page 20 of the transcript of record, concerning activities out of the Chicago office of Norton:

> "* * * we have abrasive engineers who go out to the customer and advise him on technicalities of grinding wheels, what wheels would perform the work, etc.; the engineers go in the field after the order is in; they do not solicit; it is just technical advice; we have no men in the field from the Chicago office taking orders; * * *"

The Supreme Court of Illinois in *Norton Co. v. Department of Revenue*, 405 Ill. 314, 90 N.E.2d 737 (1950) in reference to the engineers stated:

> "There are no salesmen used by appellant, but it does have a group of engineers *available to consult* with prospective customers on their needs. These engineers do not solicit or take orders for goods." (Emphasis added)

There is no evidence or judicial statement in *Norton* that associated the Norton engineers' activities with any exempt sales in *Norton*.

Since this court held in *Norton* that any exempt sales must be disassociated from local activities, this court predicated its decision in *Norton* concerning exempt sales on the premise that the activities of Norton engineers were not significantly or directly associated with the exempt sales. [3] Appellant's state-

[3] For a proper interpretation of the facts and holding in *Norton*, the dissenting opinion of Mr. Justice Clark is instructive. He concluded that the direct sales under the test laid down by the court in *Norton* should also be taxable because the taxpayer had not established that the services rendered by the Chicago office were not decisive factors in establishing and holding the Illinois market for Norton's direct sales. Obviously, a majority of the court thought otherwise.

ment on page 11 of its Jurisdictional Statement that the Norton Co. was performing services within the state in connection with the exempt sales through its corps of engineers is unsupportable by the record and opinion in *Norton*. How and to what extent, if any, these engineers were involved in the exempt sales is not in the *Norton* record.

From the foregoing, it is self-evident that *Norton* facts concerning the exempt sales are readily distinguishable from the facts in the case at bar. As found by the Court of Appeals, the trial court and the Board of Tax Appeals, the appellant's activities in Washington far exceed merely making engineers available to Boeing for consultation. These activities of appellant constitute decisive factors in appellant establishing and maintaining Boeing as a market for its products in Washington. In no sense can they be characterized as *de minimis* as to appellant's wholesale sales to Boeing.

Under these circumstances, it is error for the appellant to argue, on authority of *Norton*, *General Motors*, *Miller Bros. Co. v. Maryland*, *supra*, or *American Oil Co. v. Neill*, *supra*, that its Washington activities are inadequate (i) to establish nexus (Washington jurisdiction to impose its B&O tax on appellant's Washington wholesale activities) or (ii) to permit the tax in question to be measured by gross

receipts derived from Boeing within the purview of the commerce clause limitations.[4] As noted by the Supreme Court of Washington in *B. F. Goodrich Co. v. State*, 38 Wn.2d 663, 231 P.2d 325 (1951):

> "We only interpret the Norton Co. case as holding that such a tax [a business privilege tax] may not be levied upon the proceeds from sales with which the local outlet had nothing to do." (38 Wn.2d 675)

General Motors makes it crystal clear that the B&O tax on wholesaling is valid if the taxpayer's activities in the taxing state are decisive factors in establishing and holding the wholesale market and the taxpayer has not disassociated the wholesale sales in question from these activities. This accords with the express holding in *Norton*. Any so-called *de minimis* rule either as to due process tax jurisdiction or as to the measure of the tax is inapplicable where the taxpayer exercises substantial and decisive wholesaling activities in the state of destination and these activities have not been disassociated from the wholesale sales used as a measure of the tax liability.

In the language of *Norton*:

> "But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some

[4] In *Miller Bros. Co.*, the taxpayer's contact with the taxing state was limited to sporadic in-state deliveries of goods purchased outside the taxing state by the taxpayer. This court there affirmed the rule that due process is met if there is "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax." (347 U.S. at 345) In *American Oil Company* no aspect of the taxable transactions took place in the taxing state and the taxable events were completely dissociated from the local business. Significantly, it cited *Norton* as authority for the dissociation test.

> Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature. The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption." (340 U.S. 537)

In *General Motors*, *supra*, after analyzing the general principles applicable and the facts pertaining to General Motors activities in Washington, the Supreme Court concluded:

> "* * * we can only 'conclude that, in the light of all the evidence, the judgment attributing * * * [the corporation's Washington sales to its local activity] was within the realm of permissible judgment. Petitioner has not established that such services as were rendered * * * [through in-state activity] were not decisive factors in establishing and holding this market.'" (Material quoted by the Supreme Court was from *Norton Co.*, *supra*, at 340 U.S. 538)

Inasmuch as the facts establish that appellant came into the state of Washington to do a local business in connection with its wholesale sales and that this activity is clearly associated with its wholesale sales in this state, *Norton* and *General Motors* are dispositive of this case and establish the correctness of the decision of the Court of Appeals. These cases indicate that there is no merit to either appellant's due process of law or commerce clause arguments.

Nor is there merit to the appellant's argument that the state of origin can tax the wholesale sales in question with the result that these sales are ex-

posed to multiple taxation. Appellant cites no authority and appellee is aware of no authority that establishes that the state of origin has jurisdiction to tax the sales in question. In fact there is no legal or factual foundation laid by the plaintiff concerning this argument.

Neither is there merit to the appellant's contention that the questions are substantial as a matter of public importance. This appeal poses factual issues which have been conclusively and repeatedly resolved against the argument and contentions of the appellant in the proceedings in this cause. It is undoubtedly because of this reason that the Supreme Court of Washington declined to review the decision of the Court of Appeals.

CONCLUSION

The appellant's claim that the Court of Appeals decision is contrary to controlling judicial precedent stems primarily from its failure to properly analyze and give proper weight to the *facts* of this cause. In essence it argues that even though it conducts an intrastate business in this state which was carried on solely in connection with its wholesale sales in question and even though this business was necessary for it to make these wholesale sales, nevertheless it is constitutionally exempt from the B&O tax on wholesaling. No authority supports this novel interpretation of either due process of law or interstate commerce limitations on a state's taxing power.

It is therefore respectfully submitted that this court should decline to take jurisdiction of this matter for lack of a substantial federal question or affirm the decision of the Court of Appeals.

Respectfully submitted,

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ADDENDUM A

The appellant appeals only the imposition of the B&O tax upon its bolt division activities during the period in question. The bolt division is composed of three groups: aerospace, nut and urnbrako (Dep. 20). The appellant, through these groups, manufactures highly specialized industrial and fastener systems (Ex. M, Dep. 21-22, BTA order 1, Tr. 4). The appellant has its manufacturing plants in Santa Ana, California, and in Jenkintown, Pennsylvania—its home office (Dep. 4, BTA order 1, Tr. 4). During the period in question, its principal customer in this state was Boeing in Seattle (Dep. 4-5, BTA order 1, Tr. 4).[1]

The appellant had Mr. Martinson, a resident

[1]Because the appellant treats its other customers in a similar manner but to a lesser degree, the case has been limited by agreement of counsel to the appellant's treatment of Boeing as a customer.

employee, in the state during the period in question. Martinson was a "sales engineer" (Dep. 2, BTA order 1, Tr. 4). His supervisor was the "sales manager" (Dep. 6). His typing was done by the sales manager's secretary (Dep. 6). In training for his job, Martinson spent many weeks in the appellant's plants learning how the products were made and the general technology (Dep. 3). His training at the appellant's plants was continuous—about four trips a year to the plant for about a week or ten days at each plant. (Dep. 4).

In his home Martinson had a desk, file and telephone in a room which he used as his office (Dep. 5, BTA order 2, Tr. 5). His office was significant enough to qualify as such for federal income tax purposes (Dep. 6, BTA order 2, Tr. 5). The telephone was listed under Martinson's home address, but was used by himself and the appellant's visiting personnel for business purposes (Dep. 7-8, BTA order 2, Tr. 5). An answering service was listed under the appellant which received calls for Martinson in the bolt division (Ex. K, Dep. 6-7, BTA order 2, Tr. 5).

On the job Martinson worked directly with Boeing design engineers, Standard's engineers, and project engineers (qualification engineers) (Dep. 4, BTA order 1, Tr. 4). In working with Boeing engineers in the initial phases of aerospace design and construction, Martinson would become aware that Boeing was considering a certain fastener system (Dep. 5, BTA order 1-2, Tr. 4-5). He would initiate a products

engineering request describing in necessary detail Boeing's specifications and would send it to the appellant's chief engineer in Santa Ana, California (Ex. J, Dep. 20, BTA order 1-2, Tr. 4-5). If the appellant wished to qualify for Boeing's list of approved sources, samples were made by the appellant and shipped directly to Boeing for a qualification test (Ex. B, D, Dep. 14-16, BTA order 2, Tr. 5). Martinson would work with Boeing's engineers on qualification problems to make sure the appellant was a qualified source; and he would then notify the appellant if it had indeed so qualified (Ex. B, Dep. 3-14, BTA order 2, Tr. 5). Martinson informed the appellant of the subcontractors and the purchasing specialists or control buyers of each commodity for which it was a qualified source (Ex. A, E-1, Dep. 17-19, BTA order 3, Tr. 6). He supplied the sales manager and other personnel of the appellant with a list of competitive prices at Boeing with explanations as to stock and delivery terms (Ex. A). Martinson neither placed nor accepted orders; therefore, Boeing placed its orders directly with the appellant (Dep. 26, BTA order 2-3, Tr. 5-6). The appellant through its out-of-state offices, negotiated price and delivery date, accepted orders, handled shipments and approved any credit (BTA order 2-3, Tr. 5-6). Martinson received a copy of each sales invoice (Dep. 25, BTA order 2, Tr. 5). Deliveries were made by the appellant directly through a common carrier (Dep. 25, BTA order 2-3,

Tr. 5-6). No inventories were kept in this state (Dep. 24-25).

Once a product was sold, Martinson would work with Boeing's engineers as to any problem with the product (Dep. 10, BTA order 1-3, Tr. 4-6). The problem-solving process, including suggestions or modifications, was handled by Martinson with the appellant in much the same way as the qualification process (Dep. 10-13, BTA order 2, Tr. 5). The qualification process consumed 80 or 90 percent of Martinson's time, while the remainder was consumed by the problem-solving process (Dep. 26-27, BTA order 2, Tr. 5).

In addition to his product-oriented activities, Martinson performed public relation services, such as the arrangement for a hospitality room at a meeting of the Society of Aerospace and Process Engineers, which included Boeing engineers (Ex. C, Dep. 15, BTA order 2, Tr. 5). All expenses were sent directly to the home office (Dep. 15, 25-26). Martinson would also set up meetings between Boeing engineers and visiting groups of engineers of the appellant (Dep. 9, BTA order 2-3, Tr. 5-6). These visiting engineers were application engineers, coding engineers and general engineers who visit about three days every six weeks to discuss problems relating to the appellant and Martinson's activities with Boeing (Dep. 8-9, BTA order 2-3, Tr. 5-6).